STATE OF MICHIGAN

COURT OF APPEALS

PITSCH HOLDING COMPANY, INC., Plaintiff-Appell/Counter-Defendant-Appellee,	UNPUBLISHED August 7, 2014
v	No. 315800 Kent Circuit Court
PITSCH ENTERPRISES, INC. and GARY L. PITSCH, Defendants/Counter-Plaintiffs-Appellants.	LC No. 10-009001-CK

Before: FITZGERALD, P.J., and SAWYER and SHAPIRO, JJ.

PER CURIAM.

Defendants/Counter-Plaintiffs (defendants) appeal as of right the December 12, 2012, judgment in favor of Plaintiff/Counter-Defendants (plaintiff) in the amount of $221,559.51, which was entered following a jury verdict in favor of plaintiff. We affirm.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff is a family owned holding company whose shareholders, including defendant Gary L. Pitsch, are siblings. On January 18, 1993, the shareholders all entered into a shareholder's agreement that was drafted by plaintiff's corporate attorneys. The agreement contains a non-competition clause.

On February 1, 2006, Gary's employment with plaintiff was terminated[1] after he became involved in a physical altercation[2] with his brother, Lewis Pitsch, who was also a shareholder. On February 28, 2006, plaintiff's Board of Directors held a formal board meeting at which time Gary was removed as an officer and director of the company. On July 1, 2006, Gary formed defendant Pitsch Enterprises, Inc. Gary was allegedly in unauthorized possession of equipment

[1] Loren Pitsch voted against termination of Gary's employment and removal from the Board of Directors.

[2] Criminal charges were filed against Gary.

belonging to plaintiff's subsidiary, Pitsch Leasing, and utilized the equipment in his business and repeatedly refused plaintiff's requests to return the equipment.

On August 30, 2010, plaintiff filed a four count complaint against defendants, including claims for (1) breach of contract (breach of the non-competition provision with regard to jobs that competed with plaintiff's primary businesses[3]), (2) claim and delivery and (3) conversion (resulting from Gary's unauthorized possession and use of, and refusal to return, equipment owned by plaintiff's subsidiary, Pitsch Leasing), and (4) unauthorized use of trademarks and/or service marks.

On June 23, 2011, plaintiff filed a "Motion for Possession of the Equipment Pending Judgment and for Other Relief." Following a hearing, defendants agreed to return the equipment, with the exception of a 1996 assembled trailer that defendants asserted belonged to Pitsch Enterprises. Defendants also refused to turn over a 1986 stucco trailer, a 1995 bobcat and Clark propane hi-lo, and a white tractor, claiming that Pitsch Enterprises made repairs to these items and therefore had an equitable lien against them for the cost of the repairs. The trial court ordered defendants to return the undisputed equipment to plaintiff in an order dated August 12, 2011.

Following an evidentiary hearing on August 18, 2011, the trial court ordered that the disputed items of equipment be returned to plaintiff, and indicated that defendants could file a counterclaim for the cost of the alleged repairs that they performed on the equipment. Defendants filed a counterclaim in which they asserted that the repairs to the equipment totaled $15,514.00.

A five-day trial commenced on October 8, 2011. With regard the breach of contract claim, Steven Pitsch, plaintiff's president, testified that defendants' purchase and sale of scrap and performing union work did not compete with plaintiff's business and therefore did not violate the non-competition clause. Steven could not identify any jobs taken from plaintiff by defendants, but he noted and named a number of jobs that Pitsch Enterprises had bid on that plaintiff also had bid on. Gary acknowledged that he had bid on a number of non-union jobs that plaintiff had also bid on.

Wayne Bryan, the attorney who drafted the Shareholder Agreement, testified that the intent of the non-competition clause was to bind shareholders "as long as they owned stock, whether or not they were employed, and for five years after they sold their stock." He acknowledged that the first sentence of the clause could be interpreted to require two conditions to occur before the clause would become effective, but that the second sentence of the clause clarified that the clause would become effective when either of the two conditions occurred.

Loren Pitsch, a witness for defendants, testified that his interpretation of the non-competition clause was that, "If I own stock and am pushed out and my stock is refused to be

[3] Plaintiff did not object to defendant's business of buying scrap metal or bidding on union jobs.

purchased at a fair market price, and they want to sit there and play games and try to suppress us financially, that we have the right to use our life experience to go and earn and living . . ."

Gary testified that he had discussed the terms of the non-competition clause with the attorneys. He indicated that the goal was to ensure that the company remained a closely held family company.

With regard to the claim for claim and delivery, plaintiff presented a list of equipment that defendants possessed and refused to return to plaintiff. Defendant had possession of some of the equipment at the time his employment was terminated and took possession of some of the equipment after his termination. Testimony was presented that Gary was asked to return the equipment but refused to do so. On October 31, 2007, plaintiff's attorney sent a letter to Gary requesting that the equipment be returned, but he still refused to return the equipment. Gary, on the other hand, testified that he discussed use of the equipment with his siblings and that they agreed to allow him to use the equipment to start his business. Gary testified regarding the repairs that he performed on the equipment and the cost of those repairs.

Steven Pitsch testified that plaintiff leased equipment from one of its subsidiaries that owned various pieces of equipment that would then be leased out for various jobs.[4] He testified regarding the rental rates for the pieces of equipment that defendants had possession of from 2006 through August 2011 when the equipment was returned. The equipment rates were obtained from other rental companies. He also testified regarding the rates that had been charged to plaintiff when they would lease similar equipment from their leasing company. Steven noted that the equipment had been in possession of defendants for more than five years and was available to defendants to generate substantial revenue. Although plaintiff never had to lease other equipment to take the place of the equipment in defendants' possession, plaintiff did have incur additional expenses in labor and fuel to transfer equipment from one job site to the next for use on various projects, rather than leaving the equipment at a job site.

With regard to the claim for conversion, by the time of trial the equipment at issue had been returned. Plaintiff maintained that a claim for damages remained for the period of time that the equipment was in defendants' possession.

With regard to the claim for unauthorized use of trademarks or service marks, the trademark registration and plaintiff's company letterhead and business cards displaying plaintiff's company logo were admitted into evidence. The logo was black, white, and yellow and consisted of a diamond with the word "Pitsch" written in script across the diamond. Plaintiff's attorney had sent a letter to defendants demanding that Pitsch Enterprises discontinue using "Pitsch" in cursive form, as well as discontinue using plaintiff's Department of Transportation (DOT) number on its vehicles. Evidence of Pitsch Enterprise's logo, along with plaintiff's DOT number on two trucks, was admitted. Steven Pitsch testified that Pitsch

[4] For example, subsidiary Demolition Contractors used the leased equipment to perform demolition work.

Enterprise's logo caused substantial confusion with customers and that plaintiff received numerous faxes at its fax number that were clearly intended for Pitsch Enterprises.[5]

During closing arguments, plaintiff's attorney asserted that the non-competition clause was in effect and that defendants had violated it. Defendants, on the other hand, argued that the clause would not become effective until Gary sold his shares of stock in plaintiff. Thus, defendants asserted that the clause did not currently apply to defendants. Plaintiff's attorney maintained that defendants performed over $1 million per year in work and that Gary had acknowledged that 5% to 10% of his revenue was from non-union jobs that potentially competed with plaintiff. Thus, plaintiff's attorney argued that this amounted to $25,000 to $50,000 per year in revenue that defendant generated as a result of a violation of the clause.

With regard to the equipment that was not returned until August 2011, plaintiff argued that the rental rate was $25,000 per year on the low side or as high as $125,000 per year. Plaintiff further argued that defendants' use of plaintiff's trademark and/or script name caused confusion and resulted in damages to plaintiff and/or additional profit for defendants. Defendants argued that the damages were speculative.

The jury returned a verdict in favor of plaintiff in the amount of $125,000 with respect to the breach of contract claim, $6,400 for engaging in unfair competition and using plaintiff's trademark and/or script name, and $75,000 for loss of use of its equipment and/or wear and tear on the equipment while it was in defendants' possession. With added interest and costs, a judgment in favor of plaintiff in the amount of $221,559.91 was entered.

II. THE NON-COMPETITION CLAUSE

Defendants argue that the trial court erred by denying their motions for directed verdict and for judgment notwithstanding the verdict on the breach of contract claim because there was no ambiguity in the non-competition clause that needed to be resolved by the jury. This Court reviews de novo issues of proper contract interpretation. *Rory v Continental Ins Co*, 473 Mich 457, 464, 703 NW2d 23 (2005). Whether contractual terms are ambiguous is a question of law reviewed de novo. *Able Demolition, Inc v City of Pontiac*, 275 Mich App 577, 581; 739 NW2d 696 (2007). And, whether extrinsic evidence should be used in contract interpretation is also a question of law that this Court reviews de novo. *In re Kramek Estate*, 268 Mich App 565, 573; 710 NW2d 753 (2005). A contract must be interpreted according to its plain and ordinary meaning. *St Paul Fire & Marine Ins Co v Ingall*, 228 Mich App 101, 107; 577 NW2d 188 (1998). When the language of the contract is clear and unambiguous, interpretation is limited to the actual words used, and an unambiguous contract must be enforced according to its terms. *Burkhardt v Bailey*, 260 Mich App 636 656; 680 NW2d 453 (2004). A contract is ambiguous "when its provisions are capable of conflicting interpretations." *Klapp v United Ins Group*

[5] At the August 2011 evidentiary hearing, the trial court found that the names were confusing and potentially misleading and ordered defendants to immediately stop using the script lettering in Pitsch Enterprise's logo. However, as of trial defendants had not stopped using the script lettering.

Agency, Inc, 468 Mich 459, 467; 663 NW2d 447 (2003). The language of the contract is also ambiguous if two provisions of the same contract irreconcilably conflict with each other. *Id*. It is well settled that the *meaning* of an ambiguous contract is a generally question of fact that must be decided by the jury. *Id*. at 469 (emphasis added). However, where a contract is to be construed by its terms alone, it is the duty of the court to interpret it; it is when the contract's meaning is obscure and its construction depends upon other and extrinsic facts that the contract meaning should be submitted to the jury. *Id.*

At issue in this case is the non-competition clause contained in Paragraph 5.8 of the shareholder agreement:

> During the term of this Agreement, and if the Shares of a Shareholder are purchased under this Agreement, no Shareholder may directly or indirectly, act as an employee, independent contractor, consultant, advisor, partner, proprietor, shareholder, director, or officer of any entity which engages in the same or substantially similar business, or competes with, Company. This noncompetition agreement shall continue so long as any shareholder owns any shares (whether or not employed by the Company), and for a period of five (5) years from the date of closing under this Agreement or other transfer, and shall be effective anywhere where Company is conducting its business at the time of such purchase, sale or transfer of Shares. If the selling Shareholder breaches this Covenant, Company or the purchasing Shareholders have a right to offset against any amount of the purchase price then due to the selling Shareholder for their monetary damages arising out of said breach, the right to obtain an injunction against such activity but without the requirement of bond, and the right to seek all other remedies available in law or equity.

Defendants contend that in order for the non-competition clause to be in effect, (1) the shareholder agreement must be in effect, **and** (2) the shares of a shareholder must be purchased. They contend that because Gary still owns his shares, the non-competition clause is not effective. Plaintiffs, on the other hand, maintain that the first sentence of the clause cannot be read independently from the second sentence, which provides that the non-competition clause shall continue (1) so long as any shareholder owns any shares (whether or not employed by the company), and (2) for a period of five years from the date of closing under the Agreement or other transfer. Thus, plaintiff contends that because Gary still owns his shares, even though he is not employed by the company, the non-competition clause is in effect. Each party presented testimony with regard to their differing interpretations of the meaning of the non-competition clause. The trial court found that:

> Here, I do believe that there is ambiguity in the language of the noncompetition agreement, specifically Paragraph 5.8 contained in Plaintiff's Exhibit Number 1. We've spoken about it at great length, but this is the shareholder agreement.
>
> The noncompetition agreement begins with the following sentence:
>
> "During the term of this agreement, and if the shares of a shareholder are purchased under this agreement, no shareholder may directly or indirectly act as

> an employee, independent contractor, consultant, advisor, partner, proprietor, shareholder, director, or officer of any entity which engages in the same or substantially similar business or competes with, Company."
>
> And then it goes beyond that.
>
> [Defendant's counsel] makes a straightforward argument predicated to some degree on the testimony of Attorney Bryan that both of the two conditions must be satisfied in order for the noncompetition agreement to exist. Mr. Bosch (plaintiff's counsel) makes the opposite argument that there are two separate predicates. The existence of either predicate is enough to trigger the obligation.
>
> I'm satisfied that this contract is not clear on its face, that it does present an ambiguity, and the ambiguity must be resolved by the jury. My conclusion in this regard is fortified by the additional language in paragraph 5.8 of the noncompetition agreement.

The trial court properly determined that the language of the clause is subject to two reasonable interpretations. Consequently, factual development was necessary to determine the intent of the parties and the trial court properly presented the factual dispute to the jury.

III. DAMAGES FOR BREACH OF CONTRACT

Defendants next argue that, assuming the non-competition clause is effective, plaintiff's damages are speculative because plaintiff could not identify a single job that it had bid on and that defendants also bid on and were awarded. They contend that plaintiff did not present any evidence to prove damages with reasonable certainty. Thus, they assert that the trial court erred by denying their motion for JNOV on the issue of damages resulting from the breach of the non-competition clause.

The party asserting a breach of contract has the burden to prove damages with reasonable certainty, and may recover only those damages, which are the direct, natural and proximate result of the breach. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003). When a plaintiff proves injury, recovery is not precluded simply because proof of the amount of damages is not mathematically precise. *Severn v Sperry Corp*, 212 Mich App 406, 415; 538 NW2d 50 (1995). However, damages that are based on speculation or conjecture are not recoverable. *Berrios v Miles, Inc*, 226 Mich App 470, 478; 574 NW2d 677 (1997). A trial court should grant JNOV if the jury engaged in speculation in reaching its damages determination. *Kallabat v State Farm Mut Auto Ins Co*, 256 Mich App 146, 151; 662 NW2d 97 (2003); *Attard v Citizens Ins Co of America*, 237 Mich App 311, 321; 602 NW2d 633 (1996).

The trial court ruled as follows:

> [Defense counsel] also argues that no damages have been shown with regard to the noncompetition agreement because Mr. Steven Pitsch admitted that he can't think of a specific case where Pitsch Holding Company or any of its subsidiaries

> lost business to Mr. Gary Pitsch's company, the defendant in this case, Pitsch Enterprises.
>
> I will say this. There are many theories of damages that could be available for this noncompetition agreement, and the language of the agreement itself suggests that there is violation of the agreement simply by virtue of the act of competing. As a result of that, it is incumbent upon me to allow the jury to assess whether damages can be made available.
>
> Certainly [defense counsel] has made a powerful argument that they ought not be made available, but there's not enough here for me to grant a directed verdict because I do believe Mr. Bosch has presented evidence both with regard to loss of business and the profitability of Mr. Pitsch's company, Pitsch Enterprises, such that I must leave the matter for the jury's resolution.

Plaintiff does not dispute that the 50% of defendants' business that involves scrap sales does not compete with plaintiff's business. The remaining 50% of defendant's business involves demolition and excavation work that potentially competes with plaintiff's business if the work involves non-union jobs. According to Gary, 5 to 10% of his demolition and excavation work is non-union. These jobs formed the focus of plaintiff's claim for damages as a result of violation of the non-competition clause.

Plaintiff admitted into evidence defendants' tax returns from 2006 through 2009. Defendants earned on average $1,000,000 in sales for those years, with 50% being competing demolition or excavation work, and 5 to 10% of those sales being from non-union work. Thus, plaintiff argued that the amount of damages should be between $25,000- and $50,000 per year.

The trial court instructed the jury in relevant part as follows:

> Plaintiff Pitsch Holding Company must prove by a preponderance of the evidence the amount of any damages to be awarded. However, Pitsch Holding Company is not required to prove its damages with mathematical precision because it is not always possible that a party can prove the exact amount of its damages. Therefore, it is necessary only that Plaintiff Pitsch Holding Company prove its damage to a reasonable certainty or reasonable probability. However, you may not award damages on the basis of guess, speculation or conjecture.

The jury awarded $128,000 in damages for violation of the non-competition clause.

Given the evidence presented with regard to defendants' sales and the percentage of work performed that was non-union, the evidence was sufficient to create an issue for the jury. *Attard*, Mich App at 321. The trial court properly denied defendants' motion for JNOV.

IV. THE DURATION OF THE NON-COMPETITION CLAUSE

The jury returned a verdict in the amount of $128,000 for plaintiff on its claim that Gary breached the shareholder agreement by competing with plaintiff and the court entered an injunctive order providing that "Gary Pitsch is prohibited and enjoined from competing with

[PHC]'s business while he owns stock in the business and as set forth in paragraph 5.8" of the shareholder agreement. Defendants initially argue that the duration of the non-competition clause is "unlimited" and therefore unreasonable and that the trial court should set conclude that the non-competition clause is unreasonable in duration and set aside the injunctive order. However, as the trial court noted, the non-competition clause is not unlimited. The trial court ruled as follows with regard to this argument:

> To be sure, noncompetition obligations of substantial duration are disfavored under Michigan law, see *Coates v Bastian Bros*, 276 Mich App 498, 507 (2007), but the circumstances of Gary Pitsch's noncompetition obligation make it eminently reasonable. First, Gary Pitsch is one of only a handful of shareholders in PHC, which is a closely held family corporation. Therefore, the noncompetition agreement merely prevents Gary Pitsch from competing against his own family's company in which he owns a substantial amount of stock. Second, Gary Pitsch can rid himself of the noncompetition obligation simply by selling his stock in Plaintiff PHC and then waiting for a disqualification period to elapse. In other words, Gary Pitsch's continuing noncompetition burden flows directly from his decision to keep, rather than sell, his stock in Plaintiff PHC. Third, the noncompetition provision does not force Gary Pitsch to abstain from all work in the family's line of business. As the Court's injunctive order makes clear, the injunctive order entered on December 12, 2012, "does not prohibit Defendant Gary Pitsch from doing or working on strictly union jobs on which the Plaintiff cannot bid and/or cannot do work because it is a non-union company, nor does this provision prohibit [him] from purchasing and/or selling scrap metal" In sum, the noncompetition provision agreement set forth in the shareholder agreement and reinforced by the Court's injunctive order is plainly reasonable.[6]

Defendants do not contend that the five year disqualification period is unreasonable. Rather, they essentially contend that if the non-competition clause is deemed to be in effect until Gary sells his shares, then the clause is unreasonable because it extends "into the indefinite future." However, as the trial court opined, the duration of the noncompetition clause to five years by the selling of shares. Under these circumstances, where Gary remains a shareholder of plaintiff's closely held business, we conclude that the duration of the non-competition clause is not unreasonable.

V. THE REAL PARTY IN INTEREST

[6] We note that Steven Pitsch testified that both Gary and Loren have continued to receive their weekly wages from plaintiff and that plaintiff has continued to pay their health insurance premiums since their employment was terminated as an "advance" on the amount that they will receive if they sell their shares to plaintiff.

Defendants argue that plaintiff is not the real party in interest with respect to the claim and delivery count because the equipment at issue was owned by plaintiff's subsidiary, Pitsch Leasing, even though plaintiff owns the stock in the subsidiaries.[7]

The trial court first addressed the issue of real party interest at the time of the motion for directed verdict. During argument on the motion, plaintiff's counsel moved for amendment of the complaint, stating, "I could move and I'm doing that to amend the pleadings to conform to the proofs." The court opined:

> [T]he best I can tell you at this point is that both my law clerk and I have been feverishly trying to research while the trial's been doing on. We found a few cases which I'll cite later. I can't put it together right now because I want to read the cases first. There's a United States Supreme Court case, there's a concurrence in a Sixth Circuit opinion, that's the United States Court of Appeals for the Sixth Circuit, all of which indicate that a parent can bring a claim like this even if the equipment is held by the subsidiary. I'm going to lock that down with more authority later, but in any event, I'm going to err on the side of allowing this to go forward because as I say, the law thing we need to do is to have another trial or have an assignment of the right to pursue the claim.

The trial court next addressed the issue of real party in interest with regard to the motion for JNOV:

> Plaintiff PHC is a holding company that acts as an umbrella organization above several corporate entities and is the controlling shareholder in those subsidiaries. By all accounts, the equipment at issue in the conversion count was owned by one of the subsidiaries, rather than by Plaintiff PHC. "In Michigan, the law treats a corporation as entirely separate from its shareholders, even where one person owns all the corporate stock." *Environair, Inc v Steelcase, Inc*, 190 Mich App 289, 292 (1991), overruled on other grounds in *Health Call of Detroit v Atrium Home & Health Care Services, Inc*, 268 Mich App 83 (2005). Therefore, "a suit to enforce corporate rights or to redress or prevent injury to the corporation, whether arising out of contract or tort, must be brought in the name of the corporation, and not that of a stockholder[.]" *Id*. In light of this legal principle, Plaintiff PHC cannot claim the status of a real party in interest as to the conversion claim. E.g., *Diesel Systems, Ltd v Yip Shing Diesel Engineering Co, Ltd*, 861 F Supp 179, 181 (EDNY 1994) ("A corporation may not pierce the veil

[7] Defendants note that Michigan authority has addressed the issue of parent and subsidiary corporations in the context of an attempt by a plaintiff to enforce a liability of a subsidiary against the parent corporation, but not in the context of a parent corporation bringing a claim on behalf of a subsidiary.

of another corporation that it set up for its own benefit in order to advance the claims of the corporation.").

Fortunately for Plaintiff PHC, Michigan law provides ready-made solutions to the real-party-in-interest mess that has arisen. First, MCR 2.118(C)(1) permits the Court to amend the pleadings to conform to the evidence at trial "on motion of a party at any time, even after judgment[,], and our Supreme Court has suggested that such an amendment may even be used to "substitute[e] the proper plaintiff].]" *People for the Use of Herbert v McKinley*, 220 Mich 112, 113 (1922); accord *Washburn v Sardi's Restaurants*, 381 SE2d 750, 751 (Ga App 1989). Of course, the Court cannot mandate such an amendment *sua sponte*; Plaintiff PHC must file a motion or such relief. See MCR 2.118(C)(1). Second, the subsidiary can simply assign the conversion claim to Plaintiff PHC, and thereby confer the status of real party in interest upon PHC. See *Kearns v Michigan Iron & Coke Co*, 340 Mich 577, 580-584 (1954). Each of these solutions addresses the concerns underlying the real-party-in-interest requirement, which exists to "protect[] a defendant from multiple lawsuits for the same cause of action." *City of Kalamazoo v Richland Twp*, 221 Mich App 531, 534 (1997). Under real-party-in-interest analysis in Michigan, the "defendant is not harmed provided the final judgment is full, final, and conclusive adjudication of the rights in controversy that may be pleaded to bar any further suit instituted by any other party." *Id.;* accord *Kearns*, 340 Mich at 581, quoting *Poy v Allen*, 247 Mich App 385, 388 (1992). Whether the current real party in interest (i.e., the subsidiary) is linked to the successful conversion claim by amending the complaint to add the subsidiary as a plaintiff or, instead, the successful conversion claim is linked to Plaintiff PHC by assignment, "the defendant is not harmed" because the judgment will then constitute "a full, final, and conclusive adjudication of the rights in controversy that may be pleaded in bar to any further suit instituted by any other party." See *Poy*, 247 Mich at 388. Accordingly, neither a JNOV nor a new trial should be granted, provided that Plaintiff PHC ***promptly*** takes some type of corrective action discussed above.

Following the trial court's ruling on March 29, 2013, plaintiff filed a "Notice of Assignment by Subsidiary Companies" to plaintiff on April 9, 2013. In the notice of assignment, Pitsch Leasing Company, Inc., and Demolition Contractors, Inc., assigned to plaintiff all rights to all claims against defendants.

Defendants contend that *Kearns*, 340 Mich 577, is distinguishable because the assignment in that case occurred before trial. They contend that allowing the issue to go to the jury was not harmless, but their reasoning is not clear. Defendants fail to demonstrate how allowing the assignment after trial prejudices them. Indeed, they remain fully protected against harassment by further litigation on the satisfaction of plaintiff's judgment. *Kearns*, 340 Mich at 584. The trial court did not err by allowing plaintiff to cure a lack of standing by assignment of rights and claims.

VI. DAMAGES FOR LOSS OF USE OF EQUIPMENT

There is no dispute that defendants returned the property to plaintiff after the court ordered the return of the equipment, approximately five years after plaintiffs initially requested return of the equipment. Plaintiff maintained that it was entitled to damages for loss of use of the equipment during the period that it was deprived of use of the property. The trial court instructed the jury that, "If you find that the defendants have unlawfully taken property that belonged to the Plaintiff Pitsch Holding Company, then you may award damages to compensate Plaintiff Pitsch Holding Company for any loss of use of that property."

Defendants maintain that because the property was returned, plaintiff was entitled to nominal damages at best. They cite only *McGraw v Sampliner*, 107 Mich 141, 143; 64 NW 1060 (1895), for the proposition that "if property is returned in mitigation of damages, the damages would be nominal, 'unless injury to property, or, possibly, by reason of the detention, be shown.'" Defendants appear to ignore the last phrase of that statement – "unless injury to property, or, possibly, by reason of the detention, be shown."

It is longstanding law in Michigan that a party bringing an action for conversion should not be twice compensated with both the value of the property converted as well as the return of the property itself. *Maycroft v The Jennings Farms*, 209 Mich 187, 192-193; 176 NW 545 (1920). The *Maycroft* Court explained that,

> Conversion of personal property amounts to an attempt, on the part of the person doing the act, to wrongfully transfer the title to himself. The bringing of an action of trover amounts to an action on the part of the owner to ratify that which was before illegal, and to make it legal. The title then passes completely as of the date of the illegal taking. Hence the rule that the measure of damages for conversion is the value of the property at the time of conversion, with interest. When, however, the property is returned to the owner, either voluntarily, or at his suit, or by purchase by him, an entirely different principle intervenes. In that case compensation to him would be measured, not by the value of the property attempted to be converted, but by the deterioration, in value, if any, between the time of the illegal taking and the return to the owner, the reasonable value of its use, if it was of such a character as to be valuable for use, during the period of detention, costs and expenses in recovering the same, and perhaps other items in special circumstances. In this way the injured owner would be fully compensated, and this is always the object of the law.
>
> The two principles above stated are necessarily antagonistic, and can have no concurrent application in any given case. If an owner elects to ratify a conversion of his property, and thus effect a transfer of the title thereon to the trespasser, he no longer owns the property, has no right to its use, and is damaged only to the extent of its value and interest. If, on the other hand, he disavows the attempted conversion and recovers the property, it was his property all the time, and he may recover for the loss of its use, if valuable for use, during the time of its detention. He cannot have both the value of the property at the time of the conversion and the value of its use. This would be clear on reason, and is supported by authority. [*Maycroft v The Jennings Farms*, 209 Mich at 192-193 (internal citations and quotations omitted).]

See also *Jay Dee Contractors, Inc v Fattore Construction Co*, 96 Mich App 519, 522; 293 NW2d 620 (1980)(a prevailing party on these issues "is entitled not only to a return of the unlawfully detained property but also to any damages that arose as a direct consequence of the unlawful detention of its property."); see also *Multiplex Concrete Machinery Co v Saxer*, 310 Mich 243, 250; 17 NW2d 169 (1945); *Theatre Equip Acceptance Corp v Betman*, 266 Mich 22; 253 NW 201 (1923).

Evidence was presented that defendants had possession of plaintiff's property for approximately five years. We conclude that the trial court properly determined that damages directly attributable to the deprivation of use are recoverable, and that loss of use was an appropriate measure of damages.

Defendants also contend that plaintiff failed to present any evidence regarding damages for loss of use and, therefore, the trial court should have granted defendants' motion for JNOV with regard to the issue of damages for loss of use. They contend that plaintiff presented only hypothetical evidence of rental values for a period of five years without presenting any evidence to support the claim. They also contend that Steven Pitsch identified no lost income from any use or possession of the equipment by defendants.

Here, the evidence revealed that defendants used the Redi Haul trailer regularly and that plaintiff would have used that trailer on a near daily basis. As a result of not having the trailer, Steven testified that plaintiff extended thousands of dollars in extra man hours and fuel costs "to shuffle around more and drive somewhere else to get a trailer." Plaintiff presented an exhibit identifying the yearly rental rate for each piece of equipment and explained how each figure was determined. The jury was instructed that they did not have to agree with or accept the numbers contained in plaintiff's exhibit. The trailer had a yearly rental value of $13,400, which equates to $73,920 over the period that defendants were in possession of the trailer alone. Plaintiff also presented evidence with regard to the wrecking ball and bull dozer that defendants used. Thus, competent evidence was presented to support the jury's findings and the trial court did not err by denying the motion for JNOV and new trial.

VII. DAMAGES FOR TRADEMARK INFRINGEMENT

Defendants assert that damages for the infringement of the trademark were speculative because no evidence was presented to support a calculation of damages.

The trial court instructed the jury as follows with regard to damages for trademark and/or service mark infringement:

> If you find that the defendants have infringed upon Plaintiff Pitsch Holding Company's trademark or service mark, you may award damages based on the following: injury to good will; lost profits or profits gained by the infringer; and a royalty on the infringing sales.

See *Powerhouse Marks LLC v Chi Hsin Impex, Inc*, 463 F Supp 2d 733 (ED Mich, 2006) (the measure of damages in trademark and/or service mark infringement cases includes injury to goodwill, lost profits or profits gained by the infringer, and a royalty on infringing sales).

Here, plaintiff presented evidence that numerous customers were confused as a result of defendants' use of plaintiff's trademark. For example, plaintiff received numerous faxes and bids at its fax number that were intended for defendants, which illustrates that customers believed that defendants and plaintiff were one in the same. The jury determined that defendants had infringed upon plaintiff's mark and that the use of the mark caused damages. The jury awarded damages in the amount of $6,400, which is 5% of the damages awarded for violation of the noncompetition clause. We can presume that the jury awarded this amount as a royalty, and the damages therefore are not speculative.

VIII. MOTION FOR A DIRECTED VERDICT OR JNOV

Lastly, defendants argue that their motion for a directed verdict or for a JNOV should have been granted for all of the reasons set forth in their prior arguments. No further analysis is required as we have already discussed all of the issues raised by defendants.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ David H. Sawyer